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APPENDIX

Appendix

Stipulation upon which District Court in part based its Order and Opinion A-1

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 653

THOMAS S. GIBSON, ET AL.,

APPELLANTS,

v.

L. M. BERRYHILL, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1253.

DECISION OF THE DISTRICT COURT

Upon written stipulation of the parties (R. 195), the three-judge District Court enjoined the scheduled hearings before the State Board of Optometry, holding that the application of Section 206 Title 46, Code of Alabama, as to the Appellees, violated the Appellees' rights to due process because the Appellants were biased or prejudiced and had a pecuniary interest in the outcome of the proceedings.

QUESTION PRESENTED

Whether the District Court was prohibited by 28 U. S. C. §2283 from enjoining the Appellants from conducting administrative hearings to revoke Ap-

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pellees' licenses, where Appellees alleged the violation of due process rights and rights secured under 42 U. S. C. § 1983 and where evidence showed bias on the part of the Appellants so that Appellees would suffer irreparable injury in absence of injunctive relief.

STATEMENT

PROCEDURAL HISTORY

This is a direct appeal from the final order and judgment (R. 577) entered by a three-judge District Court convened pursuant to 28 U. S. C. §§ 2281, 2284. (R. 158)

This action, as amended (R. 111 and Order on Pre-Trial Hearing paragraph 4, R. 174) arises under Article IV, Section II and the 5th, 6th and 14th amendments to the Constitution of the United States and specifically 42 U. S. C. § 1983. Jurisdiction is conferred by Title 28, Sections 1331 and 1343 (3).

This action was brought by Appellees, Plaintiffs below, (hereinafter referred to as "Plaintiffs") who are optometrists duly licensed to practice in Alabama who were employed by a corporation, against the Appellants, Defendants below, (hereinafter referred to as "Defendants" and sometimes referred to as the "State Board of Optometry" or the "Board") members of the State Board of Optometry who are in private practice, asking the District Court to enjoin Defendants from conducting a hearing on charges theretofore preferred (R. 195, Exhibits 7, 8, 8A and 8B to Stipulation) against the Plaintiffs and from revoking or suspending the licenses of Plaintiffs to practice optometry in Alabama. Plaintiffs alleged in their complaint that the Defendants members of the State Board of Optometry,

were biased and had exhibited prejudice toward the Plaintiffs so that the Defendants could not conduct, as to these Plaintiffs, a fair, impartial hearing and that therefore, the Plaintiffs would be deprived of their right to engage in their chosen profession and earn a livelihood without being afforded due process of law as guaranteed by the Constitution of the United States. (R. 111)

FACTS

Upon the written stipulation of the parties (R. 195), depositions of the Defendants (R. 195), Plaintiffs and other exhibits as noted, the three-judge District Court enjoined the Defendants, members of the State Board of Optometry, from holding hearings to revoke Plaintiffs' licenses to practice optometry, holding that Title 46, Section 206, Code of Alabama, was unconstitutionally applied as to Plaintiffs in that it deprived them of due process rights guaranteed by the Constitution of the United States. (R. 577) The holding was based upon a finding of bias and prejudice on the part of the Defendants, which, when coupled with the authority conferred upon them by the said statute, operated to deprive Plaintiffs of their constitutional rights. The stipulated facts and exhibits thereto (R. 195) show a long history of litigation between one faction, the Alabama Optometric Association which dominated and controlled the State Board of Optometry and which described themselves as "private practitioners", and Plaintiffs who were described as "commercial practitioners", or employees of a corporation. (R. 195, Stipulation; deposition of Dr. Thomas S. Gibson, pp. 17-21, 30, 51, 53, 56-57; deposition of Dr. George W. Posey, pp. 5, 7, 8, 39-40, 50-51, 54-55; deposition of Dr. Willard Smith, pp. 13, 18, 21-23, 49-50; deposition

of Dr. George Carlton, pp. 13-14; deposition of Dr. E. Ashbee, pp. 49-51; deposition of Dr. James Cash, pp. 4, 14) Defendants, practicing under their own names, are engaged in the sale and dispensing of glasses and optical goods and the general practice of optometry. Plaintiffs, employees of Lee Optical Company at the inception of the litigation were employed as optometrists. Plaintiffs, however, were not engaged in the sale of eye glasses, in that their remuneration bore no relation to sales of optical goods. Their employer, Lee Optical, is engaged in the sale and dispensing of optical goods. (R. 195, Stipulation, paragraphs 3-5, 7)

The Alabama optometry laws, Title 46, Section 190, et seq., govern the practice of optometry in the state. Sections 192 and 206 are pertinent in that they pertain to the appointment and authority of the State Board of Optometry. Section 192 provides that the members of the State Board of Optometry (hereinafter sometimes referred to as the "Board") shall be members in good standing of the Alabama Optometric Association, Inc. (R. 161, paragraph 12 of Defendants Answer to Complaint and Counterclaim; R. 174 Pretrial Order, paragraph 6D) The Board is then given the authority to conduct disciplinary hearings and revoke licenses of practitioners for stated offenses.

The Defendants testified that they followed the dictates of the Alabama Optometric Association and that they contributed to common legal funds and in effect that the Association governed the practice of optometry. The only function the Board performed on its own was to examine applicants for licenses. The Alabama Optometric Association had been interested in the elimination of "corporate practice" for years and

some of the Defendants had chaired legislative committees or had been officers in the Alabama Optometric Association when this was sought to be accomplished. (R. 195, Stipulation, paragraph 7, deposition of Dr. Thomas S. Gibson, pp. 51, 53, 56-57; deposition of Dr. Willard Smith, pp. 20-23, 49-50; deposition of Dr. E. E. Ashbee, pp. 49-51; deposition of Dr. James L. Cash, p. 14; deposition of Dr. George R. Carlton, pp. 13-14)

The rules and by-laws of the Alabama Optometric Association prohibit membership of any optometrist who is employed by a corporation, thereby precluding Plaintiffs' membership in the profession's governing body. (R. 74, Order on Pretrial Hearing, paragraph 6D) Initially, the State Board of Optometry, at the behest of the Alabama Optometric Association, (hereinafter sometimes referred to as the "Association") attempted to impose provisions of the Association's Code of Ethics upon non-association optometrists. The recipient of this action was William B. McCrory, one of the Plaintiffs below. (R. 161, Answer to Second Cause of Action, p. 5, paragraph 13) In *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241 (1965) the Supreme Court of Alabama held that although the Legislature could constitutionally delegate the regulation of a profession to a professional association the professional association, however, could not impose its code of ethics or private rules upon non-member practitioners.

In 1965 the Alabama Optometric Association began a campaign to have certain legislation enacted which later became the basis for the actions culminating in this appeal. It is established by stipulation and the depositions attached thereto, that members of the Alabama State Board of Optometry had, in conjunction

with the Alabama Optometric Association, established a fund to procure the passage of such legislation as would eliminate "corporate practice" in the State of Alabama, thereby leaving the private practitioners as the only practicing optometrists and the only outlet for the sale and dispensing of optical goods. (R. 195, Stipulation, paragraphs 3-7) The size of the fund is unknown, however, it seems established that most of the members of the Alabama Optometric Association, including the Defendants, contributed $500.00. (R. 195; deposition of Dr. Gibson, p. 56-57; deposition of Dr. George R. Carlton, pp. 13-14) These funds were brought to Montgomery, Alabama, and given to a lawyer. The amount given to him was, according to one of the Defendants who was the President of the State Board of Optometry, "classified information". (R. 195; deposition of Dr. Thomas Gibson, pp. 56-57) These activities eventually resulted in the repeal of Section 210 of Title 46 of the Code of Alabama. Section 210 granted express authority for optometrists to advertise the sale of optical goods, allowed optical dispensaries to employ optometrists and required optical dispensaries in which eye examinations were conducted to show in their advertisement the name of a registered optometrist under whose supervision such examinations were conducted. (R. 195, Stipulation, paragraph 7)

Subsequent to the repeal of Section 210, the Board brought civil proceedings against Lee Optical Company and Plaintiffs alleging that they were engaged in illegal and unethical practices in that the Plaintiffs were employed by Lee Optical Company as Cappers and Steerers, etc., (R. 195, Stipulation, paragraph 9) and asked that such practice be enjoined. At the same time, individual charges were filed by the Alabama Optometric

Association with the Board against each of the Plaintiffs alleging the same offenses, (R. 195, Exhibits 8, 8A and 8 B attached to the Stipulation) and the Defendants notified the Plaintiffs that such charges would be set for hearing before them.

In subsequent legal proceedings, Plaintiffs were dismissed as parties from the civil suit brought by the State Board of Optometry against Lee Optical Company. This suit proceeded to trial and the Trial Court enjoined Lee Optical Company from employing the Plaintiffs. This decision was reversed and rendered by the Alabama Supreme Court. See *Lee Optical v. State Board of Optometry*, ...Ala....., 261 So. 2d 17. The Alabama Supreme Court held that the employment of optometrists by corporations was not illegal or unethical so that the actions complained of by the State Board of Optometry were not illegal or unethical. During the pendency of the appeal of *Lee Optical v. State Board of Optometry, supra*, the Defendants notified the Plaintiffs that the old charges which had been filed against them in 1965 would be set for hearing.

Plaintiffs had previously asked the Defendants to rescue themselves (R. 195, Stipulation, paragraph 2 and Exhibit No. 1 attached to the Stipulation) because they (a) had made affidavit of the Plaintiffs' guilt in the civil suit, the basis of which was the same as charges to be heard by them in the disciplinary hearings (b) had contributed to funds to finance the litigation attempting to enjoin Plaintiffs from being employed by Lee Optical Company, which employment was the basis of the disciplinary hearings (c) had contributed to a legislative fund and been active in the Alabama Optometric Association, an organization

which sought to eliminate a competing optical practice in which Plaintiffs were engaged. (R. 195, Stipulation, paragraphs 6-7).

Defendants steadfastly refused to recuse themselves from hearing the pending charges which were filed subsequent to the institution of this suit. The Defendants passed "Regulation Number One" which attempted to provide supersedeas for appeal in the event they revoked an optometrists' license. Such a grant, of course, could amount to no more than administrative grace on the part of the Board as the regulation had no statutory force or effect and could be revoked or altered at will as is illustrated by the stage and time of enactment.

When Plaintiffs were given notice that the Defendants intended to try their case on the old charges, the validity of which had been decided by the Alabama Supreme Court in *Lee Optical v. State Board of Optometry, supra*, this action was filed in the District Court because the Plaintiffs' demand that the Board recuse itself had already been denied. Facts necessary to the decision were stipulated. (R. 195) The District Court correctly found that Plaintiffs rights were violated and that irreparable injury would result.

ARGUMENT

Defendants in their "Jurisdictional Statement" and their brief, at pages 16 through 21 of their discussion of "Questions Presented" state that the District Court has held the Alabama optometry statute unconstitutional per se. Defendants are incorrect. While the Alabama Supreme Court in *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241, did hold the statute was prima

cie constitutional, the question of individual Board embers' qualifications to hear specific charges was t presented or considered. A study of *McCrory v. ood, supra,* and the opinion of the District Court, ows no conflict. In *McCrory v. Wood, supra,* the ourt was not confronted with circumstances of any milarity to the factual situation here presented. The ipulated facts in the instant case clearly show bias, rejudice and a lack of impartiality on the part of the efendants, would-be prosecutors, judges and triers f fact. (R. 195, Stipulation, including depositions of efendants, as noted on pp. 3-4 of Appellees' brief)

Defendants at pages 67 through 75 of their brief ise for the first time on this appeal 28 U. S. C. § 2283, he federal anti-injunction statute. It is submitted hat § 2283 presents the legal question before the Court nd that the recent case of *Mitchum v. Foster,* ..... . S....., 32 L. Ed 2d 705, decided June 19, 1972, y the Court clearly establishes that § 2283 does not reclude a three-judge District Court, as in this case, rom enjoining state proceedings where the state pro- eedings are attacked on the grounds that they were eing unconstitutionally applied by the state so as to ause great and irreparable harm. *Mitchum v. Foster, upra,* and this case before the Court are practically lentical. In both cases 42 U. S. C. § 1983 was invoked ecause a state proceeding was unconstitutionally ap- lying a state law, the result of which would deprive he plaintiff of his right to earn a livelihood and there- y cause him irreparable harm. Moreover, in both ases, an injunction was sought under § 1983, which is he "expressly authorized" exception to § 2283. The ourt in *Mitchum v. Foster, supra,* cites and dis- nguishes or overrules all of the pertinent cases cited

by the Defendants in their brief at pages 68 through 75.

Defendants have compounded and confused the basic issue in this action, which is the right of admittedly qualified optometrists to hold specific private employment, and to pursue a chosen profession free from unreasonable interference and unbiased regulation. It is well settled that this right is a property right protected by the Fifth and Fourteenth Amendments to the Constitution of the United States. See *United States v. Robel*, 389 U. S. 258; *Konigiberg v. State Bar of California*, U. S. Annotated 6 L. Ed 2d 1328; *Willner v. Committee of Character and Fitness of the Supreme Court of New York*, 373 U. S. 96 Annotation 2 A. L. R. 3d 1254.

Defendants question the sufficiency of evidence relating to the finding of bias and argue that the case of *Miller v. Aldridge*, 212 Ala. 660, 103 So. 835, is authority for their contention that Plaintiffs should have pursued the state remedy of mandamus to require recusal of biased or prejudiced members of the State Board of Optometry. Plaintiffs submit that *Miller v. Aldridge, supra*, does not preclude the jurisdiction of federal courts to secure constitutionally protected rights of individuals where such rights are threatened. *Ex parte Young*, 209 U. S. 123, *Boddie v. Connecticut*, ...U. S......, 28 L. Ed 2d 113; *Mitchum v. Foster, supra*. In *Mitchum v. Foster, supra*, the Court speaking of the rights of a federal court to enjoin a state proceeding stated:

IV

"§ 1983 was originally § 1 of the Civil Rights Act of 1871. 17 Stat. 13. It was 'modeled' on § 2 of the

Civil Rights Act of 1866, 14 Stat. 27 and was enacted for the express purpose 'enforcing the provisions of the Fourteenth Amendment.' 17 Stat. 13.

* * *

"As a result of the new structure of the law that emerged in the Post-Civil War era and especially of the Fourteenth Amendment which was its centerpiece, the role of the federal government as a guarantor of basic federal rights against state power was clearly established. Monroe v. Pate 365 U. S. 167, 5 L. Ed 2d 492, 81 Sup. Ct. 473; McNeese v. Board of Education, 373 U. S. 668, 10 L. Ed 2d 622, 83 Sup. Ct. 1433; Shelley v. Kraemer 334 U. S. 1, 92 L. Ed 1161, 68 Sup. Ct. 836, 3 A. L. R. 2d 441; Zwickler v. Koota, 389 U. S. 241, 245-249 19 L. Ed 2d 444, 448-451, 88 Sup. Ct. 391; Flack, The Adoption of the Fourteenth Amendment (1908); Ten-Broek, the Anti-Slavery Origins of the Fourteenth Amendment (1951). § 1983 opened the Federal Courts to private citizens offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and Laws of the nation."

The three-judge District Court held that the evidence presented by the stipulation of facts and exhibits thereto showed that Defendants, Appellants, were possibly biased so that they could not conduct the fair, impartial hearing required if Plaintiffs were to be afforded the due process of law guaranteed by the Constitution of the United States. The District Court quoted from *In re Murchison*, 349 U. S. 113, as follows:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an

absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law'. Tumey v. Ohio, 273 U. S. 510, 532, 71 L. Ed. 749, 758, 47 Sup. Ct. 437, 50 A. L. R. 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 U. S. 11, 99 L. Ed 11, 75 Sup. Ct. 11."

The stipulated evidence upon which the decision was based clearly shows the bias and prejudice which permeated and surrounded the threatened State Board of Optometry hearings. Section 192 of Title 46, Code of Alabama 1940, provided that members of the Alabama Board of Optometry shall be "a member in good standing of the Alabama Optometric Association, Incorporated or its legal successor." It is undisputed that Defendants, present members of the State Board of Optometry, were selected in accordance with Section 192 as members have been selected in the past. The by-laws of the Alabama Optometric Association prohibit membership of any optometrists who are employed by

a corporation; thereby excluding Plaintiffs from membership in the Association from which Board members (R. 174, Order on Pretrial Hearing, paragraph 6D) of the profession's governing body, under Alabama law, must come.

It is stipulated in paragraph 7 of the stipulation (R. 195) that the Alabama Optometric Association consists of approximately 100 members and that the dues paid by its members are used to finance Association activities, and to defray legal expenses of investigating, initiating and prosecuting charges against the corporation-employed optometrists who are the Plaintiffs in this action. The Alabama Optometric Association and the Board have for several years been engaged in eliminating "corporate practice", in which the Plaintiffs-Appellees are alleged to be involved, either by being employed by Lee Optical Company or by practicing optometry on Lee's premises. In 1965 the Alabama Optometric Association procured the repeal of Section 210 of Title 46 of the Optometry Code of the State of Alabama, which section had required any optical dispensary in which eyes were tested to be under the supervision of a registered optometrist. Defendants, Gibson, Carlton, Smith, Ashbee and Warr (State Board Members) contributed to a legislative fund raised by the Alabama Optometric Association to lobby the repeal of these sections; the repeal of which makes the Plaintiffs practice illegal. [Under Defendants' theory].

Defendants Gibson, Ashbee, Carlton, Warr and Smith, presently members of the State Board of Optometry and also members of the Alabama Optometric Association. (R.195, Stipulation, par. 6) Dr. Thomas S. Gibson was a member of the legislative committee of the Association in 1965 and also a member of the State

Board of Optometry. In 1965, as President of the Board of Optometry, Dr. Gibson signed a sworn complaint in a civil suit which sought to prohibit these same Plaintiffs from practicing optometry in Alabama. (R. 195, Stipulation, paragraph 6; Exhibit 7 attached to Stipulation) At the time of the filing of the civil action in state court against Plaintiffs, Defendants, Gibson, Ashbee, Carlton and Smith were members of the Board. The civil suit alleged that Plaintiffs were guilty of lending their licenses to a corporation, employing Cappers and Steerers and various other offenses. The administrative charges, prosecution of which was enjoined by the three-judge District Court, were based on the same offenses as those the Board had declared Plaintiffs guilty of in the earlier filed civil suit. See affidavit of Roy C. Adams (R. 106) the basis of charges to be heard by the Board.

Subsequent to Dr. Gibson's verification of the bill of complaint in the civil suit, charges were made against the Plaintiffs which were to be heard and decided by the same State Board of Optometry, comprised of Defendants, Gibson, Ashbee, Carlton, Warr and Smith, all private practitioner members of the Alabama Optometric Association. (R. 195, Stipulation, paragraph 6; Exhibits 7, 8, 8A and 8B, attached to Stipulation) The objective of the Defendants' charges obviously was the revocation or suspension of the Plaintiffs' licenses; this being the only disciplinary measure available by law to the State Board of Optometry.

On the stipulated facts (R. 195, Stipulation, paragraph 13) the District Court in its Opinion correctly observed:

"In the instant case, there is evidence that those who

are to judge the matter of suspension of licenses in the state administrative body have indicated their preconceived opinion in the case and that Lee Optical, for whom Plaintiffs [Appellees] worked, issued over 75,000 eyeglasses in one year. Presumably, if Plaintiffs' activities are suspended, Defendants would share in this annual business . . ."

The only substantial federal question possibly presented is whether the District Court erred in enjoining Defendants from proceeding with the pending hearings. Certainly, Plaintiffs would have been denied the right to a fair hearing before a fair and impartial tribunal and therefore subject to deprivation of their licenses to practice optometry without due process of law had the scheduled hearings been held.

The District Court in enjoining the Defendants, held Section 192 and 206 of Title 46, Code of Alabama, unconstitutionally applied as to these Plaintiffs, the Court stating:

"Pleadings and uncontradicted evidence in the instant case indicate that Plaintiffs have been actively practicing their professions since prior to 1965 and that the cases against them have been pending since that time, that the individuals who will act as judges of their cases are largely the same individuals who in 1965 supported prosecution of Plaintiffs for the very acts for which they are now being charged . . .

* * *

"Nonetheless, this Court is of the opinion that the statute places the fate of Plaintiffs, as practicing optometrists, in the hands of persons who have ap-

parent personal interest in the matter in controversy. This invades the very core of due process of law.

"... It is, therefore, the conclusion of this Court that to require the Plaintiffs to resort to the protection offered by state law in these cases would effectively deprive them of their property, that is, their right to practice their professions, without due process of law and that irreparable injury would follow in the normal course of events. Miller v. Aldridge, 212 Ala. 660, 103 So. 835; Miller v. Florida State Board of Dentistry, 296 F. Supp. 1259."

Defendants' admitted refusal to recuse themselves from the trial of Plaintiffs in light of their previous involvement in having the law changed to comply with their objectives to stifle competition, establishes beyond cavil that the prosecution of them by the Defendants to revoke their licenses is no more than another step in the process of securing to themselves a captive, non-competitive optometric business within the State of Alabama.

Plaintiffs' request for recusal of Defendants before filing of the complaint in this action, and indeed the order and opinion of the District Court, are not based upon the mere fact that Plaintiffs and Defendants share the same profession. Qualification and ethics regulations are not involved. What is involved is actual bias and prejudice on the part of Defendants based upon not only an identifiable and specific economic interest far exceeding the normal competition necessarily existing among all who pursue the same profession, but also based upon specific actions disclosed by the undisputed evidence before the District Court.

New Jersey State Board of Optometry v. Nemitz,

21 N. J. Super. 18, 90 A. 2d 740, is illustrative of Plaintiffs' position. In this case the New Jersey court in a situation similar to the instant one found that a board member, who was in direct competition with the accused optometrist, had made a complaint, had obtained services of a patient to act as investigator, and had provided funds, had therefore, clearly gone beyond his mere official duties and should have disqualified himself.

This Court has not altered its position as to protection of constitutionally protected rights. See *Boddie v. Connecticut*, ...U. S..... 28 L. Ed 2d 113, in which the following principal is stated:

> "[11] Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question . . ."

Thus, regardless of the constitutionality of the Alabama statute, in other and in proper circumstances, the particular facts of the Defendants in the posture and circumstances herein involved make the statute unconstitutional when applied to these Plaintiffs.

Defendants in an attempt to disguise the real question before the Court, the question which the Plaintiffs have heretofore proposed, have set out seven questions in their brief. These questions not only overlap one another and produce unnecessary reargument, but also assert matters which are moot or otherwise beyond the scope of the record and clearly immaterial.

Questions 1 and 2 are not material to this appeal in

that the three-judge District Court did not hold that Sections 192 and 206 of Title 46 were unconstitutional on their face. (R. 577) The District Court held that the stipulated evidence showed that the Defendants, members of the Board, were biased and exhibited prejudice as to these Plaintiffs so that the Defendants could not conduct a fair, impartial hearing guaranteed the Plaintiffs by the Constitution of the United States. Defendants quote extensively from the case of *McCrory v. Wood*, 277 Ala. 426, 171 So. 2d 241, which Plaintiffs submit shows that the Alabama Optometric Association and the Board, as far back as October of 1954 were attempting to revoke the Plaintiffs' licenses to eliminate them from the practice of optometry. In *McCrory v. Wood*, *supra*, the written charges prepared by the Alabama Optometric Association were filed with the Board. These charges averred that Dr. McCrory, the optometrist employed by Lee Optical, (one of the Plaintiffs in this case before the Court) was guilty of unprofessional conduct in that he violated Article III of the Code of Ethics promulgated by the Alabama Optometric Association. Article III limited advertising to the use of a professional card when a new licensee opens a business or an established licensee changes the location of his old business. The State Board of Optometry proceeded to hear these charges in November of 1962 despite the fact that the Supreme Court of Alabama in the case of *Alabama State Board of Optometry v. Bush Jewelry*, 261 Ala. 479, 75 So. 2d 121, decided in October of 1954, held that Article III of the Code of Ethics of the Alabama Optometric Association was contrary to the grant of the right to advertise contained in Title 46 of Sections 210 and 211 as they existed prior to 1965 when the Alabama Op-

tometric Association and the Board procured the repeal of Section 210 and a modification of Section 211.

Plaintiffs submit that *McCrory v. Wood, supra,* is additional evidence of the fact that the Alabama Optometric Association and the Defendants as far back as November of 1962 were biased, exhibited prejudiced toward the Plaintiffs, harassed the Plaintiffs and were not in good faith attempting to regulate the practice of optometry within the State of Alabama. In 1965 after the Supreme Court of Alabama had made it clear for the second time that Sections 210 and 211 of Title 46 would not allow the Alabama Optometric Association and the Board to subject Plaintiffs and corporations who employed them, to the Association's rules, the Association mounted a state wide drive among its members to have Section 210 repealed and Section 211 modified. Having accomplished this, the Association and the Board again struck at the Plaintiffs by filing charges alleging the illegal practice involved in the case of *Lee Optical of Alabama v. State Board of Optometry,* .....Ala....., 261 So. 2d 17.

Plaintiffs submit that it is evident from this long history of harassment by the Alabama Optometric Association and its arm the Board, that the Defendants, members of the Board, are biased and prejudiced against the Plaintiffs so that the Plaintiffs cannot receive a fair, impartial hearing at their hands and that the Plaintiffs would suffer great and irreparable harm if the Defendants were permitted to decide whether they have the right to practice optometry within the State of Alabama and indeed their very existence in the State of Alabama.

Defendants' question number three is frivolous and

presents nothing for the Court to consider. Defendants argue that "Board Rule Number One" would supersede the revocation of the Plaintiffs' licenses to practice optometry. Even if the Defendants were correct in this assertion, what is to prevent them from changing this rule just as easily and quickly as they adopted the same? Plaintiffs submit that this rule affords them no protection and is a sham on the part of the Defendants and was adopted after this action was initiated in an attempt to forestall the relief granted.

Plaintiffs further submit that the Defendants argument at pages 25 through 30 of their brief has nothing to do with the question which Defendants have presented and indeed is at the very least moot in view of the Supreme Court of Alabama's decision in *Lee Optical Company of Alabama v. State Board of Optometry, supra.*

Defendants, still under question number three, pages 30 through 35 of their brief, state that there was nothing improper about Defendant Gibson verifying the bill of complaint filed in the state court and state that this action was not grounds for his disqualification. Defendants attempt to support this position by citing cases from sister states. Defendants, however, ignore *Miller v. Aldridge,* 212 Ala. 660, 103 So. 835, the Alabama law on this very point. In *Miller v. Aldridge, supra,* Miller, a certified public accountant, had been expelled from the Alabama Society of Public Accountants, a social organization by the State Board of Public Accountants, which was made up of members of the Association. The Supreme Court of Alabama noted:

"[4] The averments of the petition disclose that

these Appellees have been active in the prosecution of these charges which they are called upon to hear and determine, and have contributed funds to further the prosecution. It may be conceded, as suggested by counsel for Appellees, that the petition should be construed as showing their activity and contribution of funds to have occurred prior to their appointment as members of the board, but this would not materially affect the situation. In addition to these averments, it is charged that they are inimical to Appellant, both personally and professionally, have prejudged this case, and stated that, so far as they were concerned, his certificate 'now stood as revoked'. Under the averments Appellees are charged with a direct interest in the proceedings against him, and are both prosecutors and judges in the same cause. These averments, for the present purposes, being considered as admitted, we think very clearly place Appellees, within the influence of the rule of disqualification."

Questions four and five merely restate what the Defendants have already argued in questions number two and three and therefore, no further comment is necessary.

Argument under question number six is not relevant to the question before the Court and is now also moot by virtue of *Lee Optical Company of Alabama v. State Board of Optometry, supra.* Defendants in their argument under this question attempt to retry the state court case from the time of its filing to its final determination in the Supreme Court of Alabama, wherein the court expressly held that "an optometrist may accept employment from others." The Supreme Court of Alabama stated specifically:

"[7, 8] The purpose of our optometry act is to license and regulate those who examine eyes and prescribe eyeglasses. When that purpose is accomplished by a specific statutory provision it is not within the province of the court to read into it something not designed to protect the public interest. Our statutes were designed to protect the public, and not to confer favors upon optometrists, or any special group of optometrists. Certainly, there is a social interest involved in this situation in affording the public an opportunity of procuring prescription eyeglasses at the least cost, provided incompetents are not permitted to examine eyes. Our licensing provisions were designed to see that only persons qualified to do so would perform this service."

Question number seven is the catch-all question encompassing the six foregoing questions. Defendants, however, in this question, present for the first time on this appeal, the issue of Section 2283, the federal anti-injunction statute. As Plaintiffs have asserted earlier, this is the question before the Court. Plaintiffs submit that *Mitchum v. Foster*, ...U. S..... 32 L. Ed 2d 705, and the stipulated evidence before the District Court, including the exhibits attached to the pleadings theretofore filed, show that the order and judgment of the District Court enjoining the Defendants from hearing the charges which they preferred against the Plaintiffs was proper and necessary to prevent the Plaintiffs from suffering "great and irreparable harm".

CONCLUSION

It is respectfully submitted that Defendants, members of the Alabama State Board of Optometry and

members of the Alabama Optometric Association, were properly enjoined from conducting hearings of the charges theretofore preferred by the Defendants against the Plaintiffs and from revoking the licenses of the Plaintiffs to practice optometry within the State of Alabama. If the Defendants are permitted to hear these charges the Plaintiffs would loose their livelihood and would suffer great and irreparable harm. The unanimous decision of the District Court is therefore due to be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the above and foregoing Brief of Appellees to J. G. L. Marston, III and Donald George Valeska, II, Assistant Attorneys General, Hon. William Baxley, Attorney General of Alabama, Hon. Richard A. Billups, Attorneys for the Appellants, by mailing a copy of same to them at their office addresses, first-class, postage prepaid mail this 22 day of September, 1972.

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Of Counsel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

FILED
Sep. 3, 1971
JANE P. GORDON,
Clerk

By .....
Deputy Clerk

L. M. BERRYHILL, ET AL,
Plaintiffs
Vs.
THOMAS S. GIBSON, ET AL,
Defendants.

CIVIL ACTION
NO. 3339-N

STIPULATION

It is stipulated by and between the parties as follows:

1. Paragraphs 2, 3 (a), 3 (c), 4, 5 and 6 are admitted by all of the parties, both plaintiff and defendant.

2. At the time notice of the August 1970 hearings were given plaintiffs demanded that the respondent State Board of Optometry recuse itself, a copy of the demand being attached as Exhibit 1. Subsequently the August hearing was postponed by mutual agreement of the plaintiffs and defendant State Board with the stipulation that neither party's position would be al-

tered by doing so. This agreement is set out as Exhibit 2.

3. Plaintiff optometrists are all licensed, practicing optometrists in the State of Alabama. In October of 1965 when the original charges were preferred against them, they were all employees of Lee Optical Company of Alabama, Inc., a corporation. Lee Optical Company of Alabama, Inc., is a corporation engaged in the business of optical dispensing. It sells eyeglasses at an advertised price. Prior to October 1965 Lee advertised eyeglasses, advertised that it conducted or furnished eye examination by a registered optometrist on its premises. Exhibit 3 depicts advertisements and photographs of Lee's premises showing the advertising conducted upon its premises. The optometrists employed in the Lee stores were employed on a salary. No charge was made for eye examinations except instances where the patient did not need eyeglasses. In those instances a nominal charge was made for the examination which went into Lee's receipts with the optometrist getting no part of it. A copy of the employment contract in use between Lee and its optometrists at the time of the filing of the charges against the Lee optometrists is attached hereto as Exhibit 4 with deposition testimony of Dr. William B. McCrory who identified the employment contract.

4. In October of 1965 Lee modified its advertising program by taking out of any advertisements any references to optometrical examinations or optometric services. Its ad were directed toward the advertisement of eyeglasses. A copy of the ad in use which is typical of those used since October 1965 is attached hereto as Exhibit 5. The store windows of Lee Optical do not con-

tain any reference to an optometrist or that an optometrical examination is available inside the store.

5. In April 1970 Lee entered into a new agreement with its optometrists, a copy of which is attached hereto as Exhibit 6. This agreement in substance allowed the optometrist to lease the optometrical office and equipment from Lee, to occupy the space therein for the purpose of conducting eye examinations and to set his fee. Arrangements were made whereby the Lee clerical help collects the fees which are charges, posts them on a balance sheet and Lee remits the fees to the optometrist. There is no other pecuniary arrangement between the optometrist and Lee. All pension plans, withholding tax arrangements, group insurance plans and other employee benefits which had been available to the optometrists through Lee were discontinued as of April of 1970.

Under the present arrangements the optometrist conducts examinations in the leased premises within the Lee Optical dispensary. He does not pay any rent. The consideration to Lee is the availability of an optometrist to examine eyes of patients who come in without prescriptions for glasses. Lee receives no part of the fee for the optometric examination and the optometrist receives nothing from Lee by way of remuneration because of the sale of a pair of eyeglasses. The additional examination fee is now paid by the customer who comes in.

The optometrists in the Lee Optical stores do not advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

The optometrists in the Lee Optical stores do not

advertise optometrical examinations. There is no reference in Lee advertising to the fact that there is an optometrist in the office or on the premises.

6. Defendants Gibson, Ashbee, Carlton, Warr and Smith, members of the State Board of Optometry of the State of Alabama are also members of the Alabama Optometric Association. Dr. Thomas S. Gibson was a member of the Legislative Committee of the State Association in 1965 and also a member of the Board of Optometry. As President of the Board of Optometry he signed the complaint in a civil suit, the complaint in which is attached as Exhibit 7 by which he made affidavit as to the truth of certain charges against plaintiffs. Board members at the time of the filing of the complaint against plaintiffs were defendants Thomas S. Gibson, E. E. Ashbee, George R. Carlton, Willard Smith and James L. Cash.

7. The Alabama Optometric Association consists of approximately 100 members. The dues paid by each member are $240.00 per year; of this $140.00 goes to the American Optical Association. These dues are used to finance the Association's activities and also to defray legal expenses of investigating and initiating charges against plaintiffs in this action. The Alabama Optometric Association has for several years been interested in eliminating "corporate practice" which the plaintiffs are alleged to be engaged in by being employed by Lee Optical Company or by practicing on its premises. In 1965 the Alabama Optometric Association was active in securing the repeal of Section 210 of Title 47 of the Optometry Code of the State of Alabama. This was the section which allowed and required any optical dispensary in which eyes were tested to be under the super-

vision of a registered optometrist. Defendants Gibson, Carlton, Smith, Ashbee and Warr contributed to a legislative fund raised by the Alabama Optometric Association to promote the repeal of these sections, the repeal of which allegedly makes the practice of plaintiffs illegal.

8. The State Board of Optometry has no rules or regulations governing the practice of optometry within the State of Alabama. The charges pertaining to the plaintiffs in this instance involve an alleged violation of the State Code regulating the practice of optometry as it presently exists.

9. It is stipulated by and between the parties that Section 210 of Title 47 was repealed August 4, 1965, that charges were initiated by the Alabama Optometric Association against plaintiffs and filed with the State Board October 23, 1965, a copy of the said charges made against each optometrist being the same as Exhibit 8 hereto made against Dr. Harry Sparks, that said civil suit was filed by the State Board against plaintiffs and Lee Optical on October 25, 1965, a copy of the complaint and exhibits thereto being attached as Exhibit 7.

10. Attached to the original of this stipulation are depositions of Dr. William B. McCrory and members of the State Board of Optometry taken May 21 and 22, 1970 and it is stipulated that the parties would so testify in this action.

11. It is further stipulated by and between the parties that if the individual members of the State Board of Optometry were called to testify that each of them would testify that he was not prejudiced against plaintiffs and in his judgment could render a

fair and impartial verdict on the charges brought against them.

12. It is further stipulated that each of the plaintiffs if called to testify, would testify that Lee Optical Company of Alabama, Inc., had never interferred with his professional practice, called upon him to alter his judgment and that his professional judgment was in no way affected or impaired, nor was his allegiance to his patients impaired or affected by reason of the fact that he practiced on the premises of a dispensing optician.

13. Mr. Gene Shanbaum of Dallas, Texas, Secretary of Lee Optical Company, testified in the trial of *State Board v. Lee* in the Circuit Court of Montgomery County that he had checked the records of Lee Optical and that in 1969 Lee sold 75,000 pairs of glasses in Alabama.

14. The Alabama Legislature created the School of Optometry in 1968 to be located in the Medical Complex of the University of Alabama at Birmingham and it is now in its second year of teach optometry students.

15. Drs. Pillion and Sparks, who had formerly been employees of Lee and now practice as lessees on Lee's premises, testified in the *State Board v. Lee* trial that they made more money as lessees of Lee under their present arrangement than they had as a salaried employee for Lee.

16. Dr. Milton E. Warr was appointed to the State Board of Optometry on or about January 1, 1971 and prior to that time had no contact with the charges against the plaintiffs or the suit against Lee Optical Company.

17. The employment agreement which Lee had

with its optometrists prior to April of 1970 and the lease arrangement presently in use both contain a 10 day cancellation clause.

18. If called to testify Dr. George R. Carlton, a member of the State Board, will testify that by-laws of the Association provide that the Association recommend names to the Governor for appointment to membership on the State Board. The Association in years past has made this recommendation, but has rarely been followed by the Governor. In recent years no recommendation has been made. None of the present Board members were recommended by the Association for appointment. There is no provision in the optometry law which allows the Association to nominate Board members.

19. There is no provision in the optometry laws or elsewhere for the appointment of a new Board if the present Board is enjoined from hearing pending charges.

20. The House of $8.50 eyeglasses has now been decided by the Circuit Court in Birmingham and is in the process of being appealed; a copy of the Circuit Court decree is attached as Exhibit 9.

21. Section 210 of the optometry law was repealed on August 4, 1965. There was no change in the signs and advertising done in all the Lee stores until after the charges here involved were filed on October 23, 1965 and the suit filed against Lee and its optometrists several days later.

22. The State Board of Optometry adopted Resolution No. 1 on June 13, 1971; a copy of the Resolution being attached hereto as Exhibit 10.

23. All exhibits attached to pleadings, briefs or other documents heretofore filed with the Court are admitted as to genuineness and what they purport to be for the convenience of the court; however, by admission of documents of this stipulation, neither of the parties admit the relevance thereof as to the issues.

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